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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

MICHAEL BONNEAU, Petitioner, v. THE SUPERIOR COURT OF SONOMA COUNTY, Respondent; RODOLFO DI MASSA et al., Real Parties in Interest.	A098949 (Sonoma County Super. Ct. No. 222363)

BY THE COURT:*

Petitioner Michael Bonneau ("petitioner") seeks writ relief from an in limine ruling applying judicial estoppel to bar him from testifying about the date when he invented a medical device used in coronary vascular interventions known as the "Bonneau Stent." The parties agree that the date of invention is significant in this action for misappropriation of trade secrets, breach of contract and breach of fiduciary duty. Because respondent's ruling was erroneous, we grant the requested relief.

I. WRIT REVIEW IS PROPER

As a general rule, "a ruling excluding evidence is not ordinarily subject to review by writ [citation] and typically is reviewed for abuse of discretion on appeal." (*Aas v.*

* Before Jones, P.J., Simons, J. and Gemello, J.

Superior Court (2000) 24 Cal.4th 627, 634 (*Aas*).) Nonetheless, writ review is proper where an in limine ruling may be viewed as being functionally equivalent to a nonsuit ruling, a position petitioner urges in this proceeding. (*Id.* at pp. 634-635). Additionally, where, as here, an erroneous ruling will require a retrial following a reversal on appeal, writ review is essential to prevent a waste of judicial resources. (*Barrett v. Superior Court* (1990) 222 Cal.App.3d 1176, 1183.)

Addressing the challenged in limine ruling at this juncture is particularly necessary since the improper ruling will infect proceedings at a trial in which preference has been granted to real party in interest Rodolfo Di Massa.[1] (Code Civ. Proc., § 36.) Finally, writ review is merited because the trial court's order wrongly deprives petitioner the opportunity to present evidence crucial to his defense, and the prejudice flowing to petitioner from the trial court's ruling cannot be adequately redressed on appeal. (*Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1273-1274.)

II. THE IN LIMINE RULING MUST BE VACATED

Real parties' motion in limine number 14 sought to preclude petitioner from testifying that he invented the Bonneau Stent after November 29, 1986, on the basis of judicial and collateral estoppel. Real parties relied on petitioner's statement in an unrelated marital settlement agreement (which was incorporated into a judgment) that he invented the stent prior to his November 29, 1986 marriage.[2] Real parties asserted that during discovery in the instant case, petitioner testified he did not invent the stent until October 1988.

Petitioner opposed the motion in limine and presented some additional evidence for the trial court's consideration. Following entry of the family law judgment, petitioner's former wife ("Wife") unsuccessfully sought to set aside the judgment on

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[1] Real parties in interest Rodolfo Di Massa, Karl Nigg and Stenticor International, Inc. will be referred to collectively as "real parties."

[2] The inconsistency in the record regarding the year of petitioner's marriage (i.e., 1985 or 1986) is immaterial to our analysis.

various grounds, including fraud. In response to that motion, petitioner filed a declaration stating that during the 12 months following April 1990, "I was using my time outside of work to develop a medical device (Stent) that I began developing in July, 1982, over five years before our marriage . . . ." Also, in a new declaration filed in opposition to the in limine motion, petitioner averred that he did "not believe that [he had] read the background facts set out in the Marital Settlement Agreement at all, and certainly not closely," and that his subsequent declaration in response to Wife's motion to set aside the family law judgment "set forth more clearly when the Bonneau stent was invented" as he "made clear in that declaration that it was invented between 1987 and 1990, during all of which time [he] was married to [Wife]." Petitioner further testified that his declaration in response to Wife's motion to set aside the family law judgment had not "affirmed the statement of facts set forth in the Marital [Settlement] Agreement . . . with respect to the invention date of the Bonneau stent."

The trial court ultimately granted real parties' motion in limine on the ground of judicial estoppel, precluding petitioner "from asserting a date of invention of the Bon[n]eau stent, other than that referenced in the MSA [Marital Settlement Agreement] judgment."

" '[J]udicial estoppel is an "extraordinary remed[y] to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice." [Citation.]' " (*Haley v. Dow Lewis Motors, Inc.* (1999) 72 Cal.App.4th 497, 511.) The doctrine "is invoked only after a very high threshold is cleared" (*Bell v. Wells Fargo Bank* (1998) 62 Cal.App.4th 1382, 1387 (*Bell*)) and " 'serves a clear purpose: to protect the integrity of the judicial process.' [Citation.]" (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181.) "[T]he doctrine should apply when: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake. [Citations.]" (*Id.* at p. 183.)

The parties dispute the applicable standard of review. It has been held that "[t]he determination of the existence of judicial estoppel is a factual finding which will be upheld if supported by substantial evidence." (*International Engine Parts, Inc. v. Feddersen & Co.* (1998) 64 Cal.App.4th 345, 354.) However, the Supreme Court in *Aas* ruled that "a motion to exclude all evidence on a particular claim is subject to independent review as the functional equivalent of a common law motion for judgment on the pleadings [citations], or, if decided in light of evidence produced during discovery, a motion for nonsuit [citation]. Understood as a motion for judgment on the pleadings, the dispositive question is whether plaintiffs may state a cause of action . . . . [Citation.] Understood as a motion for nonsuit, the question is whether, disregarding conflicting evidence, indulging in every legitimate inference that may be drawn from the evidence, and viewing the record in the light most favorable to plaintiffs, [the] evidence . . . will support a judgment in plaintiffs' favor. [Citations.] Accordingly, however we view the orders on review, the sole question before us is one of law." (*Aas, supra*, 24 Cal.4th at pp. 634-635.)

Petitioner claims that because the trial court "granted the[] motion[] at the outset of trial with reference to evidence already produced in discovery, [it] may be viewed as the functional equivalent of an order sustaining a demurrer to the evidence, or nonsuit." (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 27 (*Edwards*).) He correctly observes that it would have been improper for the trial court to rule on the estoppel question via a motion for judgment on the pleadings. (*Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1018-1019 [finding it inappropriate to rule on judicial estoppel in a motion for judgment on the pleadings because defendant's "effort to invoke judicial estoppel to bar plaintiff's claims raised factual issues which could not be answered by exclusive reference to plaintiff's complaint and [other court] filings"].) Real parties assert that the ruling cannot be viewed as an adjudication of a nonsuit motion because it did not effectively dispose of an entire claim or cause of action, unlike the rulings challenged in *Edwards, supra,* 53 Cal.App.4th 15 and *Aas, supra,* 24 Cal.4th 627.

We find it unnecessary to resolve this conundrum because even applying the standard that accords the greatest deference to the trial court, its ruling does not withstand scrutiny.[3] In particular, there is no substantial evidence supporting the trial court's finding that the positions taken by petitioner in the present and prior proceedings are totally inconsistent, or irreconcilable. (*International Engine Parts, Inc. v. Feddersen & Co., supra*, 64 Cal.App.4th at pp. 350-351; *Bell, supra*, 62 Cal.App.4th at p. 1387.) "The estoppel cannot be invoked where the first position was not clearly inconsistent so that holding one position necessarily excludes the other." (*Ng v. Hudson* (1977) 75 Cal.App.3d 250, 258, disapproved on other grounds, *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574.)

Although real parties appear to construe petitioner's deposition testimony in this matter as unequivocally setting forth an invention date of October 1988, in actuality, petitioner testified that "[i]n October, November of 1988," he "woke up about 2:00 o'clock in the morning" and "that was when [he] first c[a]me up with the idea of the zigzag crown stent." Notably, even assuming, arguendo, that petitioner is qualified to express an opinion on the legal question of when the invention occurred (see, generally, 2 Rosenberg, Patent Law Fundamentals (2001 rev.) § 10.01 et seq., pp. 10-5 to 10-24), he did not testify that he actually *invented* the stent in question at that particular time.

Moreover, real parties selectively quote from the representations set forth in the marital settlement agreement concerning petitioner's purported invention of the Bonneau stent, focusing only on the statement that petitioner invented the stent "[p]rior to the marriage of the parties." The marital settlement agreement, however, contains several other statements that must also be considered, including: "Husband continued to work on the invention during marriage . . . . The parties separated on August 1, 1991 . . . . After

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[3] Viewed under the less deferential standard applicable to nonsuit rulings, the disputed facts highlighted by petitioner plainly would have precluded summary judgment or adjudication (see *Bell, supra*, 62 Cal.App.4th at p. 1389; cf. *Drain v. Betz Laboratories, Inc.* (1999) 69 Cal.App.4th 950, 959, fn. 8), and a motion for nonsuit uses essentially the same standard as a summary judgment motion (see *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843).

separation, Husband continued to work on the invention . . . ." Thus, the marital settlement agreement itself reveals that petitioner labored to some extent on the invention before and during the marriage, as well as after petitioner's separation from Wife in 1991.

Read collectively, it is impossible to conclude that the statements in the marital settlement agreement regarding the stent's invention are totally inconsistent with the position real parties attribute to petitioner in this proceeding (i.e., that petitioner invented the stent in October 1988). The stent's invention date itself presents a legal question that does not readily lend itself to conclusory testimony on the subject.[4] (See 2 Rosenberg, Patent Law Fundamentals, *supra*, § 10.01 et seq., pp. 10-5 to 10-24 [invention requires both conception and a reduction to practice].) At best, the record is ambiguous about the invention date of the stent, and therefore "the inconsistency between the positions taken by [petitioner] is not sufficiently clear." (*Coleman v. Southern Pacific Co.* (1956) 141 Cal.App.2d 121, 129.)

Because substantial evidence does not support the trial court's finding that petitioner's position in the prior proceeding is totally inconsistent with the position he has taken in this action, the in limine ruling must be vacated.[5]

III. DISPOSITION

Let a peremptory writ of mandate issue commanding respondent superior court to set aside and vacate its order of June 14, 2002 (filed June 17, 2002) granting real parties' motion in limine number 14, and to enter a new and different order denying that motion.

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[4] The trial court expressed its view that "[t]his is not a situation of changing legal arguments or issues" but instead a matter of "inconsistent factual positions." However, this statement fails to take into account the complex legal concepts governing the existence of inventions, which are necessarily encompassed within petitioner's remarks about the stent's invention date. (See 2 Rosenberg, Patent Law Fundamentals, *supra*, § 10.01 et seq., pp. 10-5 to 10-24.)

[5] In light of this conclusion, we need not consider whether the remaining judicial estoppel factors are supported by substantial evidence, or address petitioner's contention that judicial estoppel presents an inappropriate subject for an in limine motion absent an evidentiary hearing.

Due to the rapidly approaching trial date, this decision will become final as to this court five days after it is filed. (Cal. Rules of Court, rule 24(d).) Petitioner shall recover the costs he incurred in this writ proceeding. (Cal. Rules of Court, rule 56.4(a).)